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Supreme Court of the United States

No. 9, October Term

Cullen Fuel Company, Inc., owner of the deck scow "Cullen No. 32,"

Petitioner,

against

W. E. Hedger, Inc., bailee of cargo.

BRIEF OF CULLEN FUEL COMPANY, PETITIONER

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Corporate Press, Inc., New York City

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BRIEF OF CULLEN FUEL COMPANY, PETITIONER

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 62 Fed. (2d) 68.

The opinion of Woolsey, *J.*, in the District Court is reported in 45 Fed. (2d) 859.

Statement of Facts.

The Cullen Fuel Company, the petitioner, is a corporation engaged in the coal business in New York City and was the owner of the scow *Cullen No. 32.*

On August 11th, 1925, that scow was chartered to W. E. Hedger, Inc., of New York City.

For brevity we shall hereafter refer to the parties as Cullen and Hedger, respectively.

The charter of the scow was an oral one made over the telephone between Sweet, an employee of Cullen, and Pierce, the vice-president of Hedger.

The charter of the scow was in the usual form which prevails in New York Harbor, whereby the scow was let to Hedger for an indefinite period and until its return to Cullen, at a fixed daily rate of charter hire. Cullen, as

owner, furnished a man to go with the boat, commonly known as a bargee.

These charters have existed in New York Harbor for many years and have been repeatedly and uniformly held to be demises.

Until two or three days before the boat was chartered it had been lying at Erie Basin, for about a month, loaded with a full cargo of brick.

On August 11, 1925, the day the boat was chartered, Sweet, an employee of the petitioner, made an inspection of it. He went down into the hold and made his examination with the aid of a flashlight and he also examined the boat externally. That examination occupied about three-quarters of an hour. He testified the boat was then in sound, seaworthy condition.

On the night of the day of the charter Hedger sent a tugboat to the plant of the petitioner at East 29th Street, New York City, where the boat was then lying and that tug towed the scow to Roosevelt Street, East River, New York City.

Hedger had made a contract to carry about 3000 tons of copper barytes from the steamship *Beck*, which was lying at Roosevelt Street, to Grasselli, New Jersey.

The next day, August 12th, some of the cargo was discharged from the steamship to the deck of the *Cullen No. 32*. This loading of the cargo on the scow continued on the following morning, until shortly before noon, when the stevedores ceased loading cargo on the scow for some unknown reason.

Within less than an hour thereafter, the boat capsized, dumped its cargo and rebounding, struck a wharf belonging to the Long Island Railroad Company on the opposite side of the slip, and also struck a carfloat belonging to the Long Island Railroad Company, doing damage to both.

After certain suits were brought, the petitioner filed its petition in the District Court for the Southern District of New York, to limit its liability as to all claims arising out of said disaster.

Claims in said limitation proceeding were filed by W. E. Hedger Co., Inc., the charterer, as bailee of the cargo, and also by the Long Island Railroad Company, for damages to its wharf and carfloat.

The claim of the Long Island Railroad Company was dismissed by the Circuit Court of Appeals and that claim is not here for consideration. The only claim involved in the present proceeding is that of Hedger, as bailee of the cargo.

The Proceedings in the Courts Below.

The action came on for hearing before Honorable JOHN M. WOOLSEY, Judge of the District Court for the Southern District of New York. The trial involved a question of fact as to whether the capsizing of the scow was due to improper loading of cargo upon it or whether it was due to some unseaworthiness on the part of the scow. The Court held the cargo was properly loaded and that the *Cullen No. 32* was unseaworthy either because it had water in it when delivered alongside the *Berk* to be loaded or that a leak existed in her starboard after corner or near it at her stern or side.

These findings of fact were purely conjectural as there was no evidence in the case sustaining either one of them.

If the cargo was properly loaded of course the capsizing of the barge under the circumstances raised a presumption of unseaworthiness.

It was held in the District Court that the scow and the Cullen Fuel Company were liable for the damage to the cargo and that the Cullen Fuel Company was not entitled to limit liability for the loss.

The Court denied the right of Cullen to limit liability because it had failed to make more frequent inspections of the scow and because the unseaworthiness was due to a leak which the owner ought to have discovered if it had made a proper inspection (see Opinion, pp. 122 and 123).

An appeal was taken to the Circuit Court of Appeals for the Second Circuit by Cullen, which affirmed the decree of the Court below, but for reasons entirely different from those given in the Court below.

The Circuit Court of Appeals, in the opinion by SWAN, *J.*, denied the right of Cullen to limit liability for the loss of the cargo because there was an implied warranty of its seaworthiness by Cullen, which was to be deemed the personal contract of the owner so as to preclude limitation of liability, saying, as follows (p. 131):

> "The covenant of seaworthiness is an implied covenant and the authorities are not in accord as to whether such an implied obligation is to be deemed the personal contract of the owner in such sense as to preclude limitation of liability under the doctrine, declared in Pendleton v. Benner Line, 248 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770. In this circuit it has been given the same effect as an express contract." The Loyal, supra (204 Fed. 930).

It is said in the opinion of the Circuit Court of Appeals that the scow was unseaworthy either by reason of leaks or was unable to resist the pressure as the cargo was loaded.

That statement was purely conjectural, as there was no evidence showing the existence of either condition.

The evidence showed that after the accident the boat was in good condition, except for the injuries which it had received in the accident.

The capsizing of the boat, under the circumstances, raised a presumption of unseaworthiness, which was not overcome.

The point upon which the Circuit Court of Appeals denied the petitioner the right to limit liability was not raised in that Court in any manner whatsoever. It was not set up either in the briefs or in the oral argument.

The petitioner, therefore, having had no opportunity to present any argument on this point and having been without its day in court moved for a reargument but that motion was denied.

Summary of Argument.

1. The Circuit Court of Appeals has held in the present case that a vessel owner cannot limit liability against claims for cargo loss or damage, if he has made a personal contract which contains no express warranty of seaworthiness, because of an implied warranty of seaworthiness of the vessel which is imputed to him by law.

2. The petitioner contends that this decision is in direct conflict with the provisions of the Limited Liability Act of 1851, by which the right to limit liability depends solely upon whether the loss or damage occurs with the privity or knowledge of the vessel owner and does not depend upon whether he has made a personal contract for the carriage of the goods.

3. The decisions of the Court as to the right of the vessel owner to limit liability, where he has made a personal contract, are conflicting, but those cases which hold that the owner cannot limit liability for cargo damage where he has made a personal contract, are erroneous, as they are based upon the Act of 1884, which has no application to claims for cargo damage at all, as the right to limit liability for such claims is governed solely by the provisions of the Act of 1851.

4. Even if under the law the cargo owner cannot limit liability for damage to cargo where he has made a personal contract for its carriage, a mere implied warranty of seaworthiness does not defeat the right to limit because that so-called warranty is not part of the contract.

5. The petitioner further contends that it made no contract whatsoever for the carriage of the cargo, under which an implied warranty of seaworthiness arose, as its only contract was that with Hedger, by which the boat was chartered to the latter. While under that contract Cullen, the owner, impliedly warranted the seaworthiness of the boat to Hedger, that warranty was only as to the seaworthy condition of the boat at the time she was delivered and was not a continuing warranty.

6. The boat owner had no contract whatsoever for the carriage of the cargo and did not in any way warrant the seaworthiness of the boat to the owner of the cargo.

7. The petitioner further contends that the cases holding, under the Act of 1884, that the owner cannot limit liability where he has made a personal contract, have no application here, because no personal contract was made by the Cullen Company, that is by any of its managing officers, and that its only contract, that is for the chartering of the boat, was made by an employee.

ARGUMENT

POINT I.

The decision of the Circuit Court of Appeals denying Cullen's right to limit liability is in direct conflict with the plain provisions of the limited liability Act of 1851 and is also in conflict with the decisions in other Circuits.

The Circuit Court of Appeals for the Second Circuit has held in this case that a vessel owner, who makes a personal contract for the carriage of cargo, cannot limit his liability for damage to cargo arising from unseaworthiness of a vessel, although without his privity or knowledge, because of the implied warranty of seaworthiness of the vessel imputed to the vessel owner by law.

The decision of the Court below is far reaching and goes beyond the facts of the case.

Under that decision, if a shipowner enters into a personal contract for the carriage of goods, he cannot limit his liability against any claim for damage to cargo because the test of his right to limit his liability is whether he has made a personal contract and not whether the loss has occurred without his privity or knowledge.

The decisions of the Courts upon the question of the right of a shipowner to limit liability where he has made a personal contract, because of the imputed warranty of seaworthiness, are in great conflict.

Not only is there conflict between the decisions in different circuits but the decisions in two of the circuits are in conflict.

In this case the Circuit Court of Appeals for the Second Circuit has changed its opinion as to the law upon this subject for the third time. It has apparently overruled its last

preceding decision in *The Ice King,* 261 Fed. 897, and has gone back to its decision in *The Loyal,* 204 Fed. 930, although the decision in that case was apparently overruled in the *Ice King, supra,* and was also in conflict with the preceding decisions upon this subject.

As the question involved was not argued before the Circuit Court of Appeals in any way but was raised by the Court after argument, Cullen, the petitioner, not having had his day in Court deemed it proper to present a petition for rehearing. That petition was denied and the petitioner therefore has never had any real hearing upon this question in the Court below.

The present decision presents a most anomalous situation. Under it, if a shipowner in New York City there receives cargo and personally issues a bill of lading for it he cannot limit liability because of the personal contract. But on the other hand if the master of the vessel signs a bill of lading the owner can limit liability for cargo losses because he has made no personal contract. Furthermore if cargo is shipped on board a vessel in New York Harbor under a through bill of lading from the West the owner can still limit liability because he has made no personal contract.

It is inconceivable that Congress in passing the Limited Liability Law, ostensibly for the encouragement of American shipping, ever intended that the Act so passed by it should produce such results. This situation raises such suspicion as to the accuracy of the decision of the Court below, aside from the conflict of decisions upon the subject, as to invite careful inquiry.

In *Pendleton* v. *Benner Line,* 246 U. S. 353, the owner of a vessel entered into a charter, which did not amount to a demise, but contained an express warranty of seaworthiness. Damage to cargo occurred without the privity or knowledge of the owner, as the evidence showed that he had used due and proper diligence to make the vessel sea-

worthy. It was held by this Court, however, the opinion being by Mr. Justice HOLMES, that, under the Act of 1884, the owner was not entitled to limit liability because he had entered into a personal contract containing an express warranty of seaworthiness.

That is as far as this Court has ever gone and it has never been held by it that the vessel owner may not limit liability for cargo losses because he has made a personal contract, under which an implied warranty of the vessel is imputed to him by law.

The decision in *Pendleton v. Benner Line, supra,* brought forth a great deal of comment and this Court was asked to review the decision in that case in *Capitol Transportation Company* v. *Cambria Steel Company,* 249 U. S. 334.

It was said in the opinion in that case as follows by Mr. Justice HOLMES:

> "We very much appreciate the danger that the Act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of the owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

The Circuit Court of Appeals for the Second Circuit heeding this admonition in *The Ice King,* 261 Fed. 897, held that a vessel owner who entered into a personal contract concerning the vessel, which did not contain an express warranty of seaworthiness, was not deprived of his right to limit liability because of the implied warranty of seaworthiness imputed to him by law. In that decision the Circuit Court of Appeals seems to have overruled the case of *The Loyal,* 204 Fed. 930.

The Circuit Court of Appeals in this case, apparently disregarding its preceding decision in *The Ice King* case,

supra, and the admonition of this Court in *Capitol Transportation Company* v. *Cambria Steel Company*, *supra*, has gone back to the decision in *The Loyal*, *supra*. The decision in that case was rendered by a most divided Court and the prevailing opinion rested almost entirely upon the decision of the Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Transportation Company* v. *Mills Transportation Company*, 155 Fed. 11, which as we shall show hereafter had not the slightest bearing upon the question involved.

The question naturally arises why there has been this conflict in decisions between the Courts in the various circuits and between the decisions of the Circuit Court of Appeals for the Second Circuit itself.

Probably one reason for this conflict is that there seems to have been a tendency to regard the right of the vessel owner to limit liability as an abstract question of law rather than one to be determined from the language of the statutes themselves.

Another reason for this conflict is the failure to distinguish between the language, meaning and purpose of the Limited Liability Acts of 1851 and of 1884.

Briefly, the proposition which we submit is, that in cases of cargo damage, under the Act of 1851 the question of whether the vessel owner has made a personal contract does not enter into the case, as under the plain terms of that statute the right to limit liability depends upon whether or not the loss is with the privity and knowledge of the vessel owner.

The Limited Liability Statutes.

The Act of March 3rd, 1851, contained two sections of remedial law. These were carried into the Revised Statutes as Sections 4282 and 4283.

Section 4282 of the Revised Statutes, now Section 182, Title 46, United States Code, commonly known as the "Fire Statute" reads as follows:

> "182. LOSS BY FIRE. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

That section was considered by this Court in *Earl & Stoddart* v. *Ellerman's Wilson Line,* 287 U. S. 420. It was held in that case that under this section a shipowner was relieved from liability for damage to cargo by fire, unless caused by his design or neglect, even when resulting from unseaworthiness existing at the commencement of the voyage discoverable by the exercise of ordinary care. The sole cause of the unseaworthiness was the negligence of the ship's chief engineer in putting a new supply of coal on top of old coal then heated, unknown to the owner.

In that case it was contended that, by the personal contract of the vessel owner, the fire statute was superseded. That argument was based upon the decisions of this Court in *Pendleton* v. *Benner Line,* 246 U. S. 353, and *Luckenbach* v. *McCahan Sugar Refining Company,* 248 U. S. 139. But it was held that those cases had no application as there was no personal contract waiving the provisions of the "Fire Statute."

In commenting upon the decisions in those cases it was stated in the opinion of Mr. Justice BRANDEIS as follows:

> "Moreover, the rule announced in the Pendleton and Luckenbach cases has been applied by this court only to private charter parties executed by the owner."

Section 4283 of the Revised Statutes, now Section 183 of Chapter 46, United States Code of Laws, applies directly to the present case.

It reads as follows:

> "183. LIABILITY OF OWNER NOT TO EXCEED INTEREST.—The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending (R. S. Sec. 4283)."

The language of this section is clear and unmistakable. It provides that the vessel owner may limit liability where the embezzlement, loss or destruction of the goods shipped or put on board the vessel is without the privity or knowledge of the owner. Under the plain terms of this section the question, therefore, is not whether the owner has made a personal contract for the carriage of the goods but whether the loss or damage occurs with his privity or knowledge.

The language of the section is too clear to admit of any other construction. Certainly it cannot be contended that the owner is deprived of his right to limit liability for loss of cargo arising from theft, without his privity or knowledge, because he has entered into a personal contract for the carriage of the goods.

So far as we are aware it has never been held in any case that under the provisions of the Act of 1851 the vessel owner is not entitled to limit liability where the damage or loss of cargo is without his privity or knowledge because he has entered into a personal contract for the carriage of the goods.

The decisions upon this subject have never considered the effect of the Act of 1851 at all but are all based upon the Act of 1884.

The provisions of the Act of 1851, which clearly define the conditions under which the vessel owner may limit liability for loss of cargo seem to have been very largely, if not entirely, overlooked in the decisions upon this question.

The provisions of Section 18 of the Act of June 26th, 1884, are contained in Section 189, Title 46, United States Code, read as follows:

> "189. LIMITATION OF LIABILITY OF OWNERS OF VESSELS FOR DEBTS.—The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending; Provided, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. (June 26, 1884, c. 121, Sec. 18, 23 Stat. 57)."

The Act of 1884 did not affect in any way whatsoever the right of a vessel owner to limit liability for cargo losses under the Act of 1851.

The sole effect of the Act of 1884 was to enlarge the scope of the limitation laws and to permit the vessel owner to limit liability against claims not included within the provisions of the Act of 1851.

In *Gokey* v. *Fort,* 44 Fed. 364, ADDISON BROWN, *D. J.,* Southern District of New York, advanced the view that the Act of 1884 was designed to extend the Act of 1851 to cases of masters' acts or contracts, and thus to bring our law in harmony with the general maritime law on this subject.

The effect of the Act of 1884 was fully considered by Mr. Justice LURTON in delivering the opinion of this Court in *Richardson* v. *Harmon*, 222 U. S. 96.

In that case a steam barge, while proceeding down the Maumee River, collided with an abutment of a railway bridge, resulting in great damage to both the barge and the bridge. The owner of the barge commenced proceedings for limitation of liability. The owner of the bridge appeared and excepted to the jurisdiction of the Court on the ground that the cause of action for damage to the bridge was non-maritime in character.

The effect of the Act of 1884 was fully considered by Mr. Justice LURTON in delivering the opinion of this Court. The following conclusions were stated:

> 1. The limited liability act, as it stood before the Act of 1884, did not include the owner's individual liability for obligations ex contractu incurred without his knowledge or privity. Neither did it extend to his individual liability for non-maritime torts by the master or crew.
>
> 2. No purpose to repeal or qualify any of the terms of the existing liability law is declared in the Act of 1884, nor is this section declared, in words, to be an amendment of that law.
>
> 3. The Act of 1884 was intended to add to the enumerated claims of the old law "any and all debts and liabilities" not theretofore included in the limited liability laws.
>
> 4. The Act of 1884 is in pari materia with the Act of 1851 and must be read in connection with that law.

It was held, therefore, that the barge owner was entitled to limit liability against the claim for damage to the bridge although that claim was non-maritime in character.

The Act of 1884 not only did not repeal or affect the Act of 1851, but as declared above the Act of 1884 must be read in connection with that Act.

The Act of 1884 merely provides that the liability of a shipowner for all debts and liabilities shall be limited to the value of his individual share in the vessel. That Act contains no provision that the owner shall not be entitled to limit liability against debts or liabilities incurred by reason of his neglect of with his privity and knowledge. But as that Act must be read in connection with the Act of 1851, the vessel owner is entitled to limit liability against the class of claims included in the Act of 1884 only where they arise without his privity or knowledge.

Great Lakes Towing Company v. *Mills Transportation Company,* 155 Fed. 11 (C. C. A. 6).

In the lower Courts the authorities are in conflict upon the question of the right of the owner to limit liability where he has made a personal contract.

While that question has never been directly decided by this Court, yet in the *Capitol Transportation Company* v. *Cambria Steel Company,* 249 U. S. 334, Mr. Justice HOLMES, in commenting upon the case of *Pendleton* v. *Benner Line, supra,* in which there was an express warranty, stated as follows:

> "We are not disposed to press the law in those directions further than the cases go."

The Decisions in the Second Circuit.

The decisions of the Circuit Court of Appeals of the Second Circuit, on this subject have been like the swing of a pendulum, and, the opinion of that Court upon the subject has already changed three times.

In *The Republic*, 61 Fed. 109 (C. C. A. 2) the owners of the barge *Republic* brought proceedings for limitation of liability. The barge was used as an excursion boat for the purpose of carrying passengers. An accident happened by which a number of the passengers were killed.

The Court denied the right to limit upon the ground that the accident occurred within the privity or knowledge of the corporation owning the boat because its president, whose duty it was to inspect the boat, and who had made an inspection, had failed to make a proper inspection and by omission of proper care in his examination of the vessel, failed to discover her defective condition.

It was contended that the boat owner could not limit liability because there was the implied warranty that the barge was reasonably fit for the service for which it was chartered, that is, that she was seaworthy.

SHIPMAN, *J.*, in delivering the opinion, stated as follows:

> "The warranty of seaworthiness which is always implied on the part of the shipowner holds him to the obligation of providing a vessel which is in all respects reasonably fit for the voyage and employment in which she is to engage. Yet there may be a breach of this obligation without his knowledge, and without his personal negligence. He may have employed a most competent expert to make all necessary examination of the vessel just prior to the voyage, an expert possessing skill and experience far beyond his own, and the expert may have failed to exercise sufficient care to discover defects which ought to have been found. It would be hard construction of the statute which would deprive the shipowner of protection under such circumstances. * * *
>
> "It was the intention of Congress to relieve shipowners from the consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own willful or negligent acts. Moore

v. Transportation Co., 20 How. 1; Walker v. Transportation Co., 3 Wall. 150; Craig v. Insurance Co., 141 U. S. 638; Quinlan v. Pew, 5 C. C. A. 438, 56 Fed. 111; Hill Manufacturing Co. v. Providence & N. Y. Steamship Co, 113 Mass. 495" (pp. 112-13).

In *The Tommy,* 151 Fed. 570 the Circuit Court of Appeals in an opinion by TOWNSEND, *J.*, referred to the decision in *The Republic; supra,* with approval.

The next case in order upon this subject in the Second Circuit is that of *The Loyal,* 204 Fed. 930.

Suit was brought against the cargo on the lighter *Loyal* to recover for salvage services. The claimant of the cargo impleaded the owner of the lighter, who filed a petition for limitation of liability.

The Court held that the owner was not entitled to limit liability but was very much split up as to the reason for denying the right to limit liability. NOYES, *J.*, was of the opinion that the owner was not entitled to limit his liability upon his personal contract, which carried with it an implied warranty of seaworthiness.

In the conclusion reached, NOYES, *J.*, relied almost entirely upon the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Towing Company* v. *Mills Transportation Company,* 155 Fed. 11. We respectfully submit that the decision in the *Great Lakes Towing* case had not the slightest bearing upon the question which was at issue in the case of *The Loyal.* The right to limit liability for a cargo damage exists under the Act of 1851. The claim in the *Great Lakes Towing Company* case was for wrecking services in an unsuccessful attempt to float a stranded vessel. The Act of 1851 did not cover a claim of that kind and if any right to limit liability existed it was under the Act of 1884.

LACOMBE, *J.*, was very much in doubt in the case of the *Loyal, supra.* He said the case was a close one and that the

Circuit Court of Appeals in the First and Sixth Circuits did not seem to be in accord as to the construction of the Act of 1884. He said he was inclined to concur with Judge NOYES and expressed the hope that an effort would be made to secure a decision by this Court so as to insure future uniformity in decisions.

An application for certiorari was made to this Court and was denied.

WARD, *J.*, concurred in the result upon the ground that the owner had not proved that the boat was unseaworthy without its privity or knowledge but he did not agree that the right to limit was lost by the implied warranty of seaworthiness. He said as follows:

> "But I cannot concur in the conclusion that the petitioner is deprived of the benefit of the acts on the ground that it has personally contracted to do the lighterage business of the Apollinaris Company, the owners of the cargo, for a fixed term. The contract contained no engagement on the subject of seaworthiness at all. The law itself imposed the duty. The breach of the implied warranty of seaworthiness is a tort, a breach of duty rather than a breach of a personal contract.
>
> "If the implied warranty of seaworthiness is to be regarded as a personal contract, shipowners cannot limit their liability in case of the death of or injury to passengers at all because the law implies in the contract of carriage a duty to carry with care. Nor can they ever limit in the case of loss or damage caused by unseaworthiness to cargo carried under bills of lading, at least when signed by them as owners, as is the case with all regular steam lines. Such results would, I think, be a great surprise to all concerned."

The question next came before the Circuit Court of Appeals for the Second Circuit, in *The Ice King*, 261 Fed. 897. In that case a petition to limit liability was filed by the

owner of the tug *Ice King* against claims for damage resulting from alleged negligent towage. It was alleged that the tugboat was not properly manned and therefore was unseaworthy.

The decree of the District Court, denying right to limit liability was reversed in the Circuit Court of Appeals. In the opinion by WARD, *J.*, it is stated as follows:

> "We know of only one decision as to the implied warranty in proceedings to limit liability, and that related to a contract for the carriage of goods. *The Loyal*, 204 Fed. 930. A contract of towing represents, not the duty of an insurer, but only the duty of exercising ordinary care and skill. Assuming, however, that such an implied warranty does exist in a contract of towage: how far does it extend? Are the owners, having furnished a sufficient and competent crew, with officers duly licensed as required by law, to be held liable for such subsequent arrangements as were made in this case, and for the subsequent intoxication of the pilot while on the trip? To extend such a warranty in this way would go far to nullify the wholesome purpose of the law. We are not willing to do so, in view of the language of the Supreme Court in the latest decision on the subject (Capitol Transp. Co. v. Cambria Steel Co., 249 U. S. 335) * * *" (p. 899).

That decision impliedly overruled the decision in *The Loyal, supra*, although it is not so expressly stated.

We believe that it has been the general impression of the bar that *The Loyal* case was overruled by *The Ice King* case. It was so assumed by the Circuit Court of Appeals for the Fourth Circuit in *Pocomoke Guano Company* v. *Eastern Transportation Company*, 285 Fed. 7, which cited the *Ice King* case as an authority supporting its conclusions that the boat owner was entitled to limit liability for the damage to cargo where the boat owner made a personal con-

tract for carriage of the cargo under which there was an implied warranty of seaworthiness.

The next decision in order in the Second Circuit upon this point is the present one which, as we have heretofore stated was made without counsel for the parties having been heard upon the question and without the question ever having been raised. That Court has now gone back to *The Loyal* case. The *Ice King* case is mentioned in the opinion but was ignored, although effect of the present decision is to overrule *The Ice King* case.

The question of the right of the vessel owner to limit liability where a personal contract of carriage was made came before THACHER, *J.*, in *Cranford-Cumberland,* 1927 A. M. C. 1615 (not elsewhere reported). In that case a collision occurred between the ferryboat *Cranford* and the steamship *Cumberland.* The *Cranford* was owned and operated by the Central Railroad of New Jersey. A number of passengers on the *Cranford* were injured. They were traveling under commutation tickets which covered not only the voyage on the *Cranford* but a subsequent railway trip. It was contended the owner of the ferryboat could not limit liability because it had made a personal contract by the sale of commutation tickets to the passengers.

THACHER, *J.*, held that the owner of the ferryboat was entitled to limit liability and after distinguishing the *Pendleton, Luckenbach* and *Capitol* cases on the ground that they concerned express warranties, stated as follows:

> "Plainly the liability here involved was not thus incurred, and I can find neither reason nor authority for denying the right to limit. The warning of the Supreme Court in the Capitol Transportation Company case, supra, is not lightly to be disregarded. It was there said:
>
> 'We very much appreciate the danger that the act should be cut down from its intended effect by

> too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go.'
>
> "To adopt the claimant's contention in this case would not only press the law far beyond any decided case which has been called to my attention, but would utterly destroy the intended effect of the statute which has been so often declared."

In the opinion of the Circuit Court of Appeals in this case reference is made to the decision of LEARNED HAND, *D. J.*, in *The Soerstad*, 257 Fed. 130, in support of the conclusion reached that the petitioner was not entitled to limit liability because of a personal contract under which there was an imputed warranty of the seaworthiness of the boat.

It was there contended that the *Pendleton* and *Luckenbach* cases applied to an implied warranty. L. HAND, *J.*, carefully analyzed the nature of a warranty and stated as follows:

> "Where, however, the promise, as a promise to tow a boat, involves the future conduct of a promisor, the loss is 'done, occasioned or incurred' not by the promise and the promisee's reliance upon it, but by the failure to perform the act stipulated; and if that failure results without the knowledge or privity of the promisor, he is entitled to immunity of the statute."

It is difficult to see how that statement of the law supports the present decision in any way whatsoever.

The Decisions in the Third Circuit.

The decisions in the Third Circuit are also in conflict.

In *The City of Camden*, 292 Fed. 93, a collision occurred between two boats by reason of the steering gear of one

of them becoming unmanageable. DAVIS, *J.*, in delivering the opinion, stated as follows:

> "We proceed upon the presumption that the vessel was unseaworthy. The determination of privity or knowledge on the part of the appellees depends upon whether or not they exercised due care and caution to put and maintain the Neptune in a seaworthy condition. They might have done so, and yet the tug notwithstanding might have been seaworthy. Individuals and corporations, not expressly warranting seaworthiness of a vessel, are entitled to limitation of liability for damage done by collision resulting from conditions to which they were not privy or of which they did not have knowledge, regardless of the negligence of third persons employed by them to make examination and repairs, provided they in good faith exercised due diligence in selecting experienced, reputable, trustworthy persons. The Tommy, 151 Fed. 570, 81 C. C. A. 50; Erie Lighter No. 108 (D. C.) 250 Fed. 490; Pocomoke Guano Co. v. Eastern Transportation Co. (C. C. A.) 285 Fed. 7."

This question again came before the Circuit Court of Appeals for the Third Circuit in *Tucker Stevedoring Co.* v. *Southwark Mfg. Co.*, 24 Fed. (2d) 410. Suit was brought for damage to cargo being carried on a lighter. The Court, however, without referring in any way to *The City of Camden* reached a conclusion directly opposite and held, under the authority of *The Loyal, supra,* that the owner was not entitled to limit liability because there was a personal contract under which there was an implied warranty to seaworthiness.

The Decision in the First Circuit.

The law in the First Circuit is opposed to that which was declared by the Second Circuit in *The Loyal* case and in the present case.

In *Quinlan* v. *Pew*, 56 Fed. 111 (C. C. A. 1), the owners of the schooner *Essex* orally chartered her to several charterers, of whom Quinlan was one. Due to a structural defect, i. e., unseaworthiness, existing prior to the departure of the vessel on her voyage, Quinlan sustained injuries. The owner sought to limit liability and Quinlan contested on the ground, among others, that the statute was not applicable because of the personal contract. The charter being oral, the warranty of seaworthiness was necessarily implied. The Court held that the statute does permit a limitation of liability notwithstanding the breach of an implied warranty of seaworthiness where there is neither privity nor knowledge. PUTNAM, *J.*, said as follows:

> "Neither can the proposition of the appellant be maintained, that the statute does not apply, because there was in this case a personal contract on the part of the owners, either express or in the form of an implied warranty, that the vessel was seaworthy. In nearly all the instances which the statute expressly enumerates as those to which the limitation of liability applies, there is necessarily an implied warranty, and frequently an express agreement in the form of a bill of lading; so that, if the contention of the complainant is correct, the wings of the statute would be effectually clipped" (p. 119).

The Decisions in the Fourth Circuit.

The law in the Fourth Circuit is also opposed to the rule as laid down by the Circuit Court of Appeals for the Second Circuit in *The Loyal* case and in the present case.

In *Pocomoke Guano Co* v. *Eastern Transportation Co.*, 285 Fed. 7 (C. C. A. 4), there was an oral hiring of a barge (without any express warranty as to seaworthiness) and the barge sank with her cargo due to structural unseaworthiness. The owner sought to limit liability and the cargo

owners contested relying on the breach of the *implied* warranty of seaworthiness. The Court said:

> "There was no express warranty in this case. An agent of the barge owner, a corporation, over the telephone contracted with a purchasing agent of the libellant to move the cargo in question from a steamer in the harbor to a nearby factory in the immediate vicinity. Nothing was signed, and no charter party entered into. Neither the corporation itself nor any of its officers signed any paper giving a warranty of any kind, or verbally did so. If from a phone message a warranty of the seaworthiness of a vessel may be implied, certainly it would not operate to create an express warranty on the part of the owner. The Ice King (C. C. A.) 261 Fed. 897" (p. 9).

The right to limit liability was granted.

In *Wessel Duval & Co.* v. *Charleston Lighterage & Transfer Co.*, 25 F. (2d) 126 (E. D. S. C.), the lighterage company orally by telephone contracted to carry a cargo of nitrate from a steamer to a wharf. The Court held that the oral contract contained an implied warranty of seaworthiness. One of the lighters sank and the Court held her unseaworthy. The right to limit liability was granted, the Court saying:

> "The case shows no express warranty by the charterer of the seaworthiness of the lighter. There was no written agreement. There were verbal conversations between Richards and Whitsitt, the president, and between Richards and Graham, the superintendent, of the petitioning corporation. These conversations were conducted over the telephone, and the services of the lighters were engaged, but nothing appears to have been said about her seaworthiness" (p. 128).
>
> "In the instant case, upon a careful examination of the record, I am constrained to find * * * that the unseaworthiness of the lighter was without the

privity or knowledge of the owner of the lighter. I think, therefore, the petitioner is entitled to limit its liability to the agreed value of the lighter" (p. 130).

Decision in the Sixth Circuit.

The cases denying the right of the owner to limit liability because of personal contract all rely largely upon the decision of the Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Towing Company* v. *Mills Transportation Company,* 155 Fed. 11.

We submit that case does not have the slightest bearing upon the question which is here involved, namely, the right of a boat owner to limit his liability for cargo damage.

In that case there was a personal contract between the Mills Transportation Company and the Great Lakes Towing Company whereby the latter agreed to perform towage and wrecking services for the Mills Transportation Company, as requested. One of the steamers belonging to the transportation company stranded in Georgian Bay. The towage company dispatched a tug and wrecking outfit which attempted to float the steamer but without success. The owner of the stranded vessel commenced a proceeding to limit his liability upon this claim. In the opinion SEVERENS, *J.*, entered into a discussion of the question of the right of the vessel owner to limit liability where a personal contract exists.

We believe that case might well have been disposed of upon a different ground, that is, as the vessel was stranded and never floated, it had ceased to be a vessel within the terms of the Act and therefore the owner could not limit liability for a claim for services upon his contract.

In that case the Court merely held that under the Act of 1884 the vessel owner could not limit his liability because he had made a personal contract for the services rendered.

It was stated in the opinion of SEVERENS, *J.*, that the Act of 1884 was intended to be merely supplementary to the Act of 1851.

The decision in that case seems to have been greatly misunderstood. All that the Court held was that under the Act of 1884 a vessel owner having made a personal contract to float a stranded ship could not limit his liability as against that claim. By no stretch of imagination can that case be construed as holding, as the Court below has in this case, that a vessel owner is not entitled to limit his liability, for cargo damage, under the Act of 1851 because there is an imputed warranty of seaworthiness.

A fair criticism of the decisions which advance the proposition that the vessel owner cannot limit his liability for cargo losses where a personal contract of carriage has been made is that they have overlooked or disregarded completely the provisions of the basic statute, that of 1851, and have blindly followed the decision in the *Great Lakes* case concerning the right to limit liability for personal contract, of the character described, under the Act of 1884.

The provisions of the Act of 1851 are clear and beyond question. The test of the right to limit liability for the cargo losses is not whether the owner has made a personal contract for the carriage of the goods but whether the loss or damage is occasioned with his privity or knowledge.

The Decisions in This Court.

In order to ascertain the effect of the decisions of this Court in the *Pendleton* v. *Benner Line*, 246 U. S. 353 (which was followed in *Luckenbach* v. *McCahan Sugar Ref. Co.*, 248 U. S. 139), and in the *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334, it is necessary to determine just what issues were presented to this Court in those cases by the shipowners and the decision of this Court upon those issues.

It will be seen by an examination of the reports in those cases that the contention made by the vessel owners was directly opposite to that which we are making here. It was there contended that the right of the vessel owners to limit liability was fixed by the Act of 1884 and that act repealed the Act of 1851. Our contention to the contrary, following *Richardson* v. *Harmon, supra,* is that the Act of 1884 did not repeal the Act of 1851 and that the right of the petitioner in the present case to limit liability is to be determined by the provisions of the latter act.

The precise questions which were presented to this Court in the *Pendleton* and *Capitol* cases are clearly shown by the opinion of Mr. Justice HOLMES in the latter case.

The Act of 1884 is broad and absolute in its terms. It states in unqualified language that the liability of vessel owners for all debts and liabilities incurred on account of the vessel shall not exceed the value of the vessel.

That act contains no restrictions whatsoever upon the right to limit liability, such as those in the Act of 1851, that the loss or damage shall be without the privity or knowledge of the owner.

It was believed by many that the intention of Congress, in passing the Act of 1884, was to clothe the vessel with the attributes of a corporation or of a limited partnership so that the liability of the vessel owners for all debts and liabilities incurred on account of the vessel should not exceed its value.

The vessel owners in the *Pendleton* and *Capitol* cases were endeavoring to enforce that idea and they did so by contending that the Act of 1884 repealed the Act of 1851 and the right to limit under the Act of 1884 was broad and unqualified and did not depend upon the owner's privity or knowledge.

That was the point which was presented in those cases for the consideration of the Court and that was the point which was decided by this Court.

There was no contention in those cases on behalf of the vessel owners that they were entitled to limit liability for cargo losses under the Act of 1851, for the obvious reason that such a contention would have been entirely inconsistent with the argument they were making, that the Act of 1851 was repealed by the Act of 1884, and if such a contention had been made it would have lessened the force of the argument. It seems quite apparent that the vessel owners, in those cases deliberately made no claim to limit under the Act of 1851, and the cases were presented as test ones, to procure a decision that the Act of 1884 repealed the Act of 1851.

Mr. Justice HOLMES in the *Capitol Transportation* case, *supra*, in which this Court was asked to review the *Pendleton* case, said as follows:

> "On that case the argument that the limitation of the exoneration to acts, etc., done or incurred without the privity or knowledge of the owner, was repealed by the Act of 1884, was presented in the fullest way."

It is obvious, that in the *Pendleton* and *Capitol* cases the point which was urged upon this Court was that as the Act of 1884 repealed the Act of 1851, the right to limit liability, therefore, was governed solely by the provisions of the Act of 1884 which contained no restriction whatsoever upon the right to limit the acts occurring, even with the privity or knowledge of the owner.

No other question was presented to the Court. No contention was made as to the right to limit under the Act of 1851 and all that this Court did in the *Pendleton* and *Capitol Transportation* cases was to decide the question which was presented. This Court could not, in those cases,

reach any other conclusion than it did, without overruling *Richardson* v. *Harmon, supra.*

All that this Court did in those cases was to hold that the ship owner could not under the Act of 1884 limit liability if he had made an express warranty of seaworthiness.

The Court went no further in those cases. It did not make any decision as to the rights of vessel owners to limit under the Act of 1851 as it was not called upon to do so, and apparently the shipowners did not want one.

It can hardly be seriously contended that the decisions of this Court, that a vessel owner who has made a personal contract containing an express warranty, is not entitled to limit his liability under the Act of 1884, are erroneous. But those decisions do not hold that vessel owner cannot limit liability under the Act of 1851 where there is an implied warranty of seaworthiness, as under the provisions of the latter act the right of the ship owner to limit liability for cargo losses depends upon whether the loss occurs with his privity or knowledge and not upon whether he had made a personal contract for the carriage of the goods.

In this case the evidence shows clearly and the Circuit Court of Appeals has held that the unseaworthiness or presumed unseaworthiness of the boat was without the privity or knowledge of the owner. It is said in the opinion as follows (p. 132):

> "In the case at bar the Cullen Company had no actual knowledge that she was in a leaky condition when sent out."

The decision of the Court below is in conflict with the spirit and purpose of the Limited Liability Acts.

In *La Bourgogne,* 210 U. S. 95, at page 120, Mr. Chief Justice WHITE stated as follows:

"In the Hill case, 100 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617, after summarizing the various provisions of the act of 1851, and calling attention to the rules previously adopted by this court to enforce the same, concerning the general purpose of the act the court said (p. 588):

> 'In these provisions of the statute we have sketched, in outline, a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but, if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions.'"

In *Capitol Transportation Company* v. *Cambria Steel Company*, 249 U. S. 334, Mr. Justice HOLMES stated as follows (p. 336):

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of the owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

The Circuit Court of Appeals for the Second Circuit has broadly decided that a vessel owner cannot limit his liability where he has made a personal contract for the carriage of the goods although the Act of 1851 provides that he shall be entitled to limit where the loss or damage occurs without privity or knowledge.

Under the rule laid down by the Circuit Court of Appeals, a shipowner cannot, if he has made a personal contract for carriage of goods, limit his liability for loss of cargo by theft of the crew or by any other person, although the Act of 1851 expressly so provides.

If the rule laid down by the Circuit Court of Appeals is correct, then it has equal application to the "Fire Statute" and no vessel owner, who enters into a personal contract for the carriage of the goods can limit his liability for loss of cargo by fire and under the rule the question would not be whether the fire occurs without the neglect or design of the owner but whether he has made a personal contract for the carriage of the goods.

Congress has passed another act which has limited the shipowner's liability for claims for damage to cargo.

We refer to the Act of February 13, 1893, Section 192, Title 46 of the U. S. Code, commonly known as the Harter Act.

Under the Third section of that Act, if the owner uses due diligence to make his vessel seaworthy, he is not responsible for loss or damage resulting from faults or errors of navigation.

If the rule which has been laid down by the Circuit Court of Appeals is sound, it would have equal application to that Act as to the Limited Liability Act of 1851.

POINT II.

Even if under the law, the boat owner cannot limit liability for damage to cargo where he has made a personal contract for its carriage a mere so-called implied warranty of seaworthiness does not defeat the right to limit because that so-called warranty is not part of the contract.

As we have heretofore stated this Court held in *Pendleton v. Benner Line*, 246 Fed. 353, that where the vessel owner by his contract enters into a personal contract whereby he expressly warrants the seaworthiness of the boat, he cannot limit liability against claims for damage to cargo under the Act of 1884.

We have also called attention to the following statement of Mr. Justice HOLMES in the *Capitol Transportation Company v. Cambria Steel Company*, 249 U. S. 334:

> "We are not disposed to press the law in those directions further than the cases go."

The decision of the Circuit Court of Appeals in this case really rests upon its previous decision in *The Loyal*, 204 Fed. 930.

NOYES, *J.*, in that case, was of the opinion that the shipowner could not limit liability because the implied warranty was a personal contract, and stated as follows:

> "The implied contract that the lighter was seaworthy attached to the express contract was, in our opinion, just as much a personal contract of the vessel owner as the express contract itself. It was precisely as if written in the contract."

WARD, *J.*, was of the opinion that the implied warranty did not prevent the owner from limiting liability and said as follows:

> "The contract contained no engagement on the subject of the seaworthiness at all. The law itself imposed the duty."

We respectfully submit that the statement made by NOYES, *J.*, was erroneous and is opposed to the basic principles of the law of contracts.

A contract is positive and not negative in its character. The contract results only where there has been a mutual understanding by the parties, or, as it is commonly expressed where there has been a meeting of the minds of the parties.

It necessarily follows that as the contract covers only those subjects upon which the minds of the parties have met, that the law cannot make a contract for the parties nor by law can a provision be inserted in a contract upon which the minds of the parties have not met and upon which they have not agreed.

Suppose "A" charters his yacht to "B" for the summer season by a written contract. Neither one has ever heard of the warranty of seaworthiness and consequently the contract of charter is silent upon that subject. How can it be said under those circumstances that "A" by contract has warranted the seaworthiness of the yacht, as the minds of the parties never met upon the subject and neither one ever had any warranty of seaworthiness in mind?

We submit the law is that where there is no express warranty under the contract, that this so-called implied warranty is not a part of the contract but is only a result or condition which follows from the relations which the parties have created by themselves by their contract.

In other words, all that the law says to the vessel owner who charters a vessel is that if he enters into a contract to charter his vessel to another, then, as a consequence of the contract he must furnish a seaworthy vessel. The law does not pretend to say that he has agreed to furnish a seaworthy vessel notwithstanding he did not agree to furnish one.

The law on this subject is in our judgment properly stated by Lord BLACKBURN, in *Steel* v. *State Line Steamship Co.*, 3 A. C. at page 86, as follows:

> "I take it, my Lords, to be quite clear, both in England and Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose."

Speaking with precision, there can be no implied warranty of seaworthiness. A warranty is a statement or representation of an existing fact or condition. If there is no statement in the contract of the existence of that fact or condition no warranty can exist. In other words, there can be no warranty except an express warranty, that is, where the contract itself contains the warranty.

We might refer to many instances where the parties by contract create certain relations between themselves, that the law declares that certain results follow from the creation of those relations.

Under the provisions of the Act of 1893, commonly known as the Harter Act, a shipowner is not liable for damage to cargo resulting from errors or faults in navigation provided he has used due diligence to make the vessel seaworthy. It is not necessary that the bill of lading or contract of carriage should contain a provision that the owner shall be entitled to the benefits of the Harter Act, nor does that Act become by law a part of the contract.

The shipowner becomes entitled to the benefit of the provisions of the act, because he and the cargo owner, by their contract created certain relation between themselves as bailee and bailor, or as carrier and cargo owner.

A man may employ a servant by a written contract which contains no provision that the servant, if injured in the performance of his master's work, shall receive compensation under the Workmen's Compensation Law. The Workmen's Compensation Law is not written into the contract nor has

it become a part of it. The servant becomes entitled to compensation, if injured, because of the status of master and servant created by the contract and the law applies to that status.

Two persons may enter into a written contract, creating the relation of master and servant, which expressly provides that the servant shall not be entitled to receive compensation under the Workmen's Compensation Law, for injuries received in the performance of the master's work. That provision would be invalid, as being opposed to public policy, and, the servant would be entitled to receive compensation in the event of injury notwithstanding it. But it would be futile to contend in such a case that the parties had impliedly agreed that the servant should be entitled to compensation when they had expressly agreed that the servant should not be entitled to compensation.

No case has gone further than to hold that the vessel owner cannot limit liability where he has made a personal contract. It must be admitted that even under those cases that the contract made by the master of the vessel is not a personal contract of the owner nor is one made by a mere agent or employee of the vessel owner a personal contract of the owner. Assuming for the argument that the implied warranty becomes a part of the contract, upon what ground can it possibly be contended that the owner has made a personal contract warranting the seaworthiness of the vessel when in fact he has not done so and the warranty, if one exists, is made for him by the law?

We submit in conclusion that the so-called implied warranty is a misnomer and the true rule is as stated by Lord BLACKBURN that where a vessel owner charters his vessel an obligation or duty is imposed upon him to furnish a seaworthy vessel independently of the contract and that no provision can be read into the contract by which the owner warrants the seaworthiness of the vessel, notwithstanding the fact that he has not done so in his contract.

POINT III.

The petitioner made no contract, personal or otherwise, for the carriage of the cargo.

The Circuit Court of Appeals denied the right of the petitioner to limit liability for damage to the cargo because of a personal contract although the petitioner had made no contract, personal or otherwise, for the carriage of the cargo.

The facts are as follows:

Sweet, an employee of Cullen, orally chartered the boat to Hedger under the common form of New York Harbor charter. Hedger made a contract, although the evidence is very meager, for the carriage of about 3,000 tons of copper ore on the steamship *Berk* to Grasselli, N. J.

The following consequences resulted:

The charter to Hedger was a demise whereby he became the owner *pro hac vice* of the boat.

> *Monk* v. *Cornell Steamboat Company,* 198 Fed. 472 (C. C. A. 2);
> *The Willie,* 231 Fed. 865 (C. C. A. 2);
> *Dailey* v. *Carroll,* 248 Fed. 466 (C. C. A. 2).

Cullen warranted the seaworthiness of the barge to Hedger, but that warranty was only as to the seaworthiness of the boat at the time of its delivery to the charterer and it was not a continuing one.

> *The Ice King,* 261 Fed. 897 (C. C. A. 2);
> *O'Boyle* v. *United States,* 47 Fed. (2d) 585 (C. C. A. 2).

There was no implied warranty of the seaworthiness of the boat by Cullen, its owner, to the owner of the cargo but Hedger, the charterer and carrier, did impliedly warrant

the seaworthiness of the boat to the cargo owner under the contract of carriage.

Nothwithstanding there was no contract by Cullen, the petitioner, for the carriage of the cargo, yet the boat being considered a sentient being, became liable for the proper carriage of the cargo under that line of cases which holds that in the case of a chartered vessel the vessel becomes bound for the safe carriage of the cargo upon the principle that the vessel and the cargo are mutually bound to one another.

See *Taylor Bros. Lumber Co.* v. *Sunset Lighterage Co.*, 43 Fed. (2d) 700 (C. C. A. 2) and cases there cited.

But that liability in the case of a chartered vessel extends only to the vessel itself and the owner is not personally bound for the performance of the contract of carriage made by the charterer. *Taylor Bros. Lumber Co.* v. *Sunset Lighterage Company, supra.*

The claim in this case was not filed in the name of the owner of the cargo but in the name of Hedger, as bailee (Record, p. 8).

Notwithstanding the fact that Cullen had no contract whatsoever for the carriage of the cargo yet the Court below has denied the right to limit liability because of a personal contract.

The Court below said that under the decision of this Court in *Pendleton* v. *Benner Line*, 246 U. S. 353, that the Hedger Company, as bailee of the cargo, can recover its loss upon the Cullen's breach of the warranty of seaworthiness (Record, p. 352).

There is a marked distinction between the *Pendleton* case and the present one. In the former case Pendleton, the owner of the schooner, made a charter to the Benner Line but that charter did not amount to a demise, while the charter in this case was a demise. There was also an ex-

press warranty of seaworthiness in that case while in the present one there was only an implied warranty of the seaworthiness of the boat running from Cullen to Hedger.

Mr. Justice HOLMES, delivering the opinion of this Court in the *Pendleton* case, stated as follows:

> "Wherever, in theory of law, the technical possession may have been, we do not perceive why the charterer should be denied full damages upon the express contract when its liability over also was determined by contract exactly as was expected. The ground upon which bailees have been allowed to recover the full value of goods from wrongdoers has been stated for centuries to be their liability over. Y. B. 9 Edw. IV. 34, pl. 9, is an example of what has been repeated from that day to this. See Brewster v. Warner, 136 Mass. 57, 59, 49 Am. Rep. 5. Whatever may be the inadequacy, in history or theory, of the reason as applied to torts, it applies with real force to contract relations like those in this case. The whole question is hardly more than technical, as there is no doubt that this suit really represents the owners' interests, since it is brought at the request of the insurers, who have paid the loss."

It will be seen in the first instance that Mr. Justice HOLMES admitted the inadequacy of the theory of the right of a bailee to recover upon the ground of his liability over, and, in the second instance stated that in view of that inadequacy the question was hardly more than technical as the suit represented the owner's interest.

The above reasons given for permitting the bailee to recover are inconsistent. If the bailee was entitled to recover because it really represented the cargo owner's interest the right of bailee, of course, was identical with that of the owner of the cargo and he had no rights other than those possessed by the cargo owner. It is quite apparent that in a case of this kind that the cargo owner had no right of action

against Cullen upon the contract of charter party. If the claim had been filed by the cargo owner in this case unquestionably he could not have sued upon the charter party. His claim would have been against the boat only *in rem;* and Cullen would have been entitled to limit liability as he had no contract with the cargo owner.

The question arises as to which of these two inconsistent theories Mr. Justice HOLMES relied on. If the bailee merely sued on behalf of the cargo owner or its underwriters the vessel was entitled to limit liability. In order to defeat the right to limit liability, it must be held the charterer of the vessel, as bailee of the cargo, has some higher rights than the cargo owner, upon the theory that he is liable over to the cargo owner.

Mr. Justice HOLMES admitted the inadequacy of this theory as applied to torts but said they applied with real force to contract relations similar to those involved.

While it is undoubtedly true that the historical origin of the right of a bailee to sue for damage to the property in his possession under a bailment rests upon the theory of the liability of the bailee over, yet we submit that as Mr. Justice HOLMES stated that doctrine is inadequate and we submit that the more modern theory is, that the right of the bailee to recover arises out of his possession of the property, which he has a right to maintain as against the entire world, except the bailor under some conditions.

A simple instance is sufficient to show that under the modern law the bailee has a right to recover when there is no liability over on his part. Suppose two vessels are in collision, each carrying cargo, and one is solely at fault. No one would question the right of the owner of the innocent vessel as bailee of the cargo to sue the wrongdoing vessel to recover for the damages to the cargo. Under those conditions the right of the innocent ship to sue as bailee depends

solely upon the possession of the cargo and not upon liability over.

In *United States* v. *American Surety Company*, 155 Fed. 941 (SANBORN, *J.*) it was held that the United States could maintain a suit against a mail carrier and the surety on his bond conditioned that the carrier should account for all property and money coming into his possession by virtue of his position notwithstanding there was no liability on the part of the United States.

When this Court was asked in *Capitol Transportation Company* v. *Cambria Steel Company*, 249 U. S. 335 to review the decision in the *Pendleton* case, Mr. Justice HOLMES, delivering the opinion of the Court, stated as follows:

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

The present case is a forcible illustration of the danger mentioned by Mr. Justice HOLMES.

There is no express warranty of seaworthiness in this case as there was in the *Pendleton* case but nevertheless the Court below has denied the right of the petitioner to limit liability because it made a personal contract, notwithstanding it had never made any contract, personal or otherwise, for the carriage of the cargo and had no contractual relations whatsoever with the cargo or the owner of the cargo.

Any legal theories which will hold one for the breach of a contract, when in fact he entered into no contract whatsoever is obviously fallacious.

Hedger filed his claim merely as bailee of cargo (see answer, p. 8). He made no claim to recover on account of his liability over.

There is no evidence that he was liable over. The contract of carriage between Hedger and the cargo owner, Pierce, vice president of Hedger testified as follows (p. 109):

> "We were asked by Grasselli to arrange for the transportation, to arrange for the stevedoring and to arrange for the towing to their plant."

For all that the record shows Hedger by his contract with Grasselli might be exempt from liability for the loss of this cargo. Contracts of that kind are not uncommon.

If Hedger seeks to recover upon the theory of liability over, the burden of proof was imposed upon him and he has not met that burden as there is no evidence of liability over upon him.

POINT IV.

The boat-owner is entitled to limit liability because the contract of charter was not made by any of its managing officers but by an employee.

The contract for the chartering of the boat was made over the telephone by Sweet, an employee of the Cullen Company. Sweet described himself as superintendent of the marine department (Record, p. 16). He was not an officer of the company.

No question is raised as to his authority to make the contract.

Sambraus, the vice-president of the Cullen Company, described Sweet's position with the company as follows (pp. 73 and 74 of the Record):

"By Mr. Middleton:

Q. In your capacity as vice-president of the Cullen Company do you keep an eye on your various boats with reference to their seaworthy condition or do you leave that solely to Mr. Sweet? A. Well, up until 1929 I was very much interested because I was right at the work all the time at 29th and 30th Street and there wasn't a day that went by that I didn't see a considerable number of boats in the slip down there.

Q. Did you conceive it to be part of your duties in 1925 to inspect the boats for seaworthiness? A. Yes.

Q. Did you inspect the 32? A. No.

Q. You left that for Mr. Sweet? A. Yes, sir.

By the Court:

Q. What is he called? A. He is in charge of the captains and marine office.

Q. You call him the head of your marine department? A. Yes.

By Mr. Shortridge:

Q. Was Mr. Sweet the manager of the work that you describe as taking care of the repairs of your boats? A. Well, sort of superintending the men, for he was continually there.

Q. Who was his immediate superior in that work? A. Myself, personally.

Q. And you were an officer of the company at that time, were you not? A. Yes, sir.

Q. Mr. Sweet was not an officer of the company? A. No, he wasn't."

The law is well settled that knowledge or privity under the Act of 1851 means the knowledge or privity, in the case of a corporation, of its managing officers.

In *Craig* v. *Continental Insurance Company*, 141 U. S. 638, Mr. Justice BLATCHFORD stated as follows:

> "When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation. In Hill Mfg. Co. v. Providence & N. Y. S. S. Co., 113 Mass. 495, 499, 500, it was said that the object of the statute was to exempt the owners of ships from the onerous liability to which they were held by the common law, as common carriers or otherwise, for the acts or neglect of their servants or agents, or of third persons, without their own knowledge or concurrence; not to diminish their responsibility for their own willful or negligent acts."

The law upon this subject is fully discussed and authorities cited in *Pocomoke Guano Co.* v. *Eastern Transp. Co.*, 285 Fed. 7 (C. C. A. 4).

WADDILL, *J.*, in delivering the opinion of the Court, stated as follows:

> "Corporations, like others, are entitled to the benefit of limitation of liability from conditions to which they are not privy, and of which they have no knowledge, and they are chargeable with knowledge of the existence of defects, or become privy to acts of negligence causing the same, only when persons representing the corporation in such capacities as to speak for the same are guilty of some negligence or omission to maintain the barge in seaworthy condition. They are likewise exempt from liability for the negligence of third persons employed to repair and put the barge in seaworthy condition, where they have, in good faith, exercised due diligence and care in the selection of such persons; that is to say, those trustworthy, experienced, and capable of performing the service, and of good reputation in the business. A few authorities bearing upon the barge's liability, under circumstances such as existed here, may be cited: Craig v. Continental Ins. Co., 141 U. S. 638, 645, 647, 12 Sup. Ct. 97, 35 L. Ed. 886; Quinlan v. Pew, 56 Fed. 111, 115, 117, 118, 5 C. C. A. 438; The Republic, 61 Fed. 109, 112, 113, 9 C. C. A. 386; The

Annie Faxon, 75 Fed. 312, 315, 21 C. C. A. 366; Van Eyken v. Erie R. R. Co. (D. C.) 117 Fed. 712; The Tommy, 151 Fed. 570, 573, 81 C. C. A. 50; Eastern Dredging Co (D. C.) 159 Fed. 541, 547; The Alola (D. C.) 228 Fed. 1006; The Richard F. Young (D. C.) 245 Fed. 503; Erie Lighter Co. No. 108 (D. C.) 250 Fed. 490, 494; People's Navigation Co. v. Toxey (C. C. A.) 269 Fed. 793."

In *The 84-H*, 296 Fed. 427, ROGERS, *J.*, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit, stated as follows:

"This brings us to consider the meaning of the words 'privity and knowledge' as they are found in the act under consideration. The statute withholds the right to limit liability if the shipowner had 'privity or knowledge' of the fault which occasioned the damages to be recovered. The privity or knowledge must be actual and not merely constructive. It involves a personal participation of the owner in some fault or act of negligence causing or contributing to the injury suffered. There must be some fault or negligence on his part or in which he in some way participates. Lord v. Goodall, etc., S. S. Co., 4 Sawy. 292, Fed. Cas. No. 8506; The Colima (C. A.) 82 Fed. 665, 679."

In *The Republic*, 61 Fed. 109, SHIPMAN, *J.*, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit, stated as follows:

"The English courts have always construed the acts as intending to exempt the shipowner when he himself has not been in any way to blame, and to deny him the limitation of his liability only when personal blame is attributable to him. The Warkworth, 9 Prob. Div. 20, 145; The Spirit of the Ocean, 34 Law J. Adm. 74. Undoubtedly, by our statute, as by the English statutes, the common law liability of

the shipowner is not restricted in cases where his personal neglect has been an inducing cause of the loss. It was the intention of congress to relieve shipowners from the consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own willful or negligent acts. Moore v. Transportation Co., 24 How. 1; Walker v. Transportation Co., 3 Wall. 150; Craig v. Insurance Co., 141 U. S. 638, 12 Sup. Ct. 97; Quinlan v. Pew, 5 C. C. A. 438, 56 Fed. 111; Hill Manuf'g. Co. v. Providence & N. Y. Steamship Co., 113 Mass. 495."

The Circuit Court of Appeals found that the managing officers of the Cullen Company had no knowledge of the unseaworthiness of the boat. Sweet, an employee of the company, who was delegated to make an inspection of the boat, said that he found it in seaworthy condition. Even if it be held that Sweet's inspection was negligent, without the knowledge of the owner, under the authorities above cited, Cullen would still be entitled to limit liability, in the absence of any contract.

We submit that the same rule applies as to contracts, that is as the contract in this case was not made by any of the managing officers of the corporation but by Sweet, an employee, the right of the petitioner to limit liability remains unimpaired.

LASTLY.

It is respectfully submitted that the decree below should be reversed.

Respectfully submitted,

HORACE L. CHEYNEY,
Counsel for Petitioner.